No. 92-287

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

THOMAS G. WALLER AND MYRA L. WALLER, INDIVIDUALLY, AND THOMAS G. WALLER, AS THE ADMINISTRATOR OF THE ESTATE OF MICHAEL JEFFREY WALLER, DECEASED, AND MATTIE K. HAMILTON,

Petitioners,

vs.

OZZY OSBOURNE; CBS INC., CBS RECORDS INC., ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the courts below correctly ruled that the prerecorded lyrics of a song which are audible, although not immediately intelligible, are protected by the First Amendment from allegations that such lyrics incite and cause minors to commit suicide.

RULE 29.1 LISTING

Respondent CBS Inc. has no parent company. The following are those subsidiaries and affiliates which are not wholly owned:

Bala Cynwyd Associates
CBS/FOX Stereo Inc.
CBS Gramophone Records & Tapes, Ltd.
Meadowlands Parkway Associates
Network Television Association

Respondent CBS Records Inc. is now known as Sony Music Entertainment, Inc. whose ultimate corporate parents are:

Sony Corporation (Japan)
Sony USA, Inc.

The following are the subsidiaries of Sony Music Entertainment, Inc.:

Sony Music Entertainment (Australia) Pty. Ltd.
Sony Music Entertainment (Austria) Ges. m.b.h.
Sony Music Entertainment (Korea) Inc.
Sony Tune, Inc.
Sony Music Canada, Ltd.
Sony Songs, Inc.
Epic/Sony Music Inc.
Important Record Distributors, Inc.
Portrait/Solar Music, Inc.
Tree Publishing Co., Inc.
Vista Marketing
Raven Records, Inc.
YM Corporation

RULE 29.1 LISTING–Continued

The following are affiliated with Sony Music Entertainment Inc.:

Sony Music Entertainment (Argentina) S.A.I.F.
Sony Music Productions Pty. Ltd.
Sony Music Australia Ltd.
Entertainment Distributors Company Pty.
Music Publishing Co. of Australia Pty. Ltd.
Phonographic Performance Company of Australia Ltd.
Music Services Center Gessellschaft m.b.h.
Sony Music Entertainment (Belgium) S.A./N.V.
Sony Music Endiocoes Musicals Ltds.
SME (Brazil) Industria e Commercia Ltds.
Sony Music Manaus Industria e Commercia Ltds.
Sony Music Canada Inc.
Sony Music Entertainment (Canada) Inc.
Columbia Records Services Inc.
Sony Music Entertainment (Chile) Ltds.
Sony Music Entertainment (Columbia) S.A.
Sony Music Entertainment (Costa Rica) Inc.
CBS Records Limited
Sony Music Entertainment (Denmark) Aps
Grammofonselskaba Distributions Centralan Aps
Sony Music Entertainment (Dominican Republic) S.A.
Sony Music Entertainment (El Salvador) S.A.
Sony Music Entertainment Ltd.
Sony Music Entertainment (Finland) OY
Helsinki Tel. Co.
PEC Musikkitukku
Tempere Tel. Co.
Sony Music Entertainment (France) SA

RULE 29.1 LISTING–Continued

Canal Musique et Fiction (Inactive)
Epic Product
Eurochusique
Gilda S.A.R.L.
Metropolis – FM Frequency Radio
SCPP
Self Music
TV6
Sony Music Publishing GMBH
Sony Music (Germany) B.m.b.h.
Music & More Direct Marketing GmbH
Sony Classical B.m.b.H
Sony Music Entertainment Holdings (Germany) GmbH
CBS Electronics Ltd.
Sony Music Entertainment (Greece) AEBE
Music and Video Enterprises Ltd.
Sony Music Entertainment (Guatemala) S.A.
Sony Music Entertainment (Holland) B.V.
Funokler B.V.
Grammoservice B.V.
CBS Grammophone Records and Tapes Ltd.
April Music SSK (Inactive)
CBS Records SSK (Inactive)
Pakhsh Ahang Iran SSK
Sony Music Entertainment (Italy) S.P.A.
Sony Music Entertainment S.r.1.
Sony Music Entertainment (Kenya) Limited
Sony Music Entertainment (Malaysia) Sdn. Berhad

RULE 29.1 LISTING–Continued

Sony Music Entertainment (Mexico) S.A.
Sony Music Entertainment (New Zealand) Limited
Sony Music Entertainment (Nigeria) Ltd.
Sony Music Entertainment (Norway) A/S
Sony Music Entertainment (Panama) S.A.
Sony Music Entertainment (Peru) S.A.
Sony Music Entertainment (Portugal) Ltda.
Sony Music Entertainment (Puerto Rico) Inc.
Sony Music Entertainment (Singapore) (Ple.) Ltd.
Sony Music Entertainment (Spain) S.A.
Sony Music Entertainment (Sweden) AB
Sony Music Publishing AB
Grammo Rack Service AB
Sklvakademien
Sony Music Columbia A.G.
Sony Music Inc. (Baar)
Sony Music Entertainment (Thailand) Ltd.
CBS Music (Thailand) Limited
Sony Music Entertainment UK Group Ltd.
Deylan Ltd. (formerly CBS Records Ltd.)
Lucal Ltd. (formerly CBS Ltd.)
The Music Club Limited
Sony Music Entertainment United Kingdom Limited
Sony Music Entertainment Holdings Ltd.
Sony Discos Inc.
Columbia Recording Corp.
Cross Keys Publishing Co.

RULE 29.1 LISTING–Continued

Epic Records Inc.
Important Record Distributors, Inc.
Kriven Inc.
Masters International Inc.
Sony Classical Productions, Inc.
Sony International Ltd.
Tree Productions Inc.
Twig Music Inc.
Sony Music/Pace Partnership
Nation Records
Columbia House Company (Canada)
Sony Music Entertainment (Venezuela) C.A.

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STATUTE

O.C.G.A. §16-12-103 12

Respondents John "Ozzy" Osbourne ("Osbourne"), CBS Inc., and CBS Records Inc. (collectively, "CBS"), respectfully request that this Court deny the Petition for writ of certiorari seeking review of the Eleventh Circuit's order affirming the grant of summary judgment by the United States District Court for the Middle District of Georgia.

STATEMENT OF THE CASE

This Petition arises out of the allegations surrounding the unrelated suicides of Michael Jeffery Waller ("Waller") and Harold Matthew Hamilton ("Hamilton"). Separate actions were filed seeking damages from Osbourne and CBS. Both the *Waller* and *Hamilton* cases were disposed of by the United States District Court for the Middle District of Georgia upon the joint summary judgment motions of CBS and Osbourne. The cases were consolidated on appeal to the Eleventh Circuit Court of Appeals where, on May 27, 1992, without further opinion, the District Court's decision was affirmed.

In both *Waller* and *Hamilton* the Petitioners claim that the music of Osbourne and in particular the song "Suicide Solution" caused the suicide of an adolescent. In *Waller*, and initially in *Hamilton*, Petitioners went further, asserting that one portion of the song "Suicide Solution", which is audible but not immediately understandable, contained a "subliminal message" encouraging suicide. The *Hamilton* Petitioner later abandoned this allegation.

Waller: Respondents refer this Court to the district court's opinion reproduced at pages 1-A through 28-A of

the Petition for a restatement of the pertinent facts of *Waller*. Briefly stated, the case was filed by the parents of a young adult who had committed suicide after a period of drinking. Without reiterating all of the details of the case (particularly given that the district court's opinion fully and accurately states the facts of the case) Respondents will only respond to certain misstatements made in the Petition:

Petitioners' recitation of their "experts'" conclusions does not accurately describe the record. The evidence presented to the district court revealed that plaintiffs could not establish that a "subliminal" existed in any of Osbourne's music. The court, plaintiffs' "experts" and counsel thoroughly and exhaustively analyzed all of the master recordings from which Osbourne's album "Blizzard of Ozz" was manufactured and found no subliminal messages. In fact, plaintiffs' "experts" concluded that all of the lyrics on the "Suicide Solution" cassette tape were audible to the naked ear although some were difficult to understand. Plaintiffs' claim became an argument that Osbourne's lyrics were confusing and, based on an incorrect interpretation, socially unacceptable.

Petitioners' expert, Mr. Hall, who believed before the case was filed that a "subliminal" existed on Osbourne's music, was forced to withdraw that opinion and change his conclusion to an utterly meaningless claim that the words were "preconscious suggestions", but not subliminal. The novel term "preconscious suggestions" only meant, according to Mr. Hall, that the lyrics were unclear.

Likewise, the characterization of Ms. Evans' conclusions are misstated in the Petition. Ms. Evans asserted a

wholly contradictory opinion in the district court, rather than anything meaningful to oppose summary judgment. She misused the highly charged term "subliminal" by concluding that Osbourne's music was "subliminal" yet she admitted that she actually heard the lyrics while listening to the cassette tape of the song "Suicide Solution". In other words, although Ms. Evans freely labeled the "28 second interval" as "subliminal" her testimony supported the opposite conclusion, *i.e.*, that the 28 second interval was audible and not subliminal.

The district court determined that the shifting labels used by plaintiffs and their experts could not change the unequivocal facts – that the lyrics may have been unclear but they were certainly audible and were not subliminal. The district court rejected plaintiffs' claims because plaintiffs could only oppose summary judgment with claims that they just did not approve of the social worth of Osbourne's music.

Further, the Petition does not clearly explain what the purported "28 second interval" is truly about. Plaintiffs initially claimed that the "28 second interval" was an audible direction to commit suicide. They said they actually heard the words "get the gun and try it" and "why try, why try" after extensive listening to the cassette tape. Later they amended their complaint to allege that the words in the "28 second interval" were subliminal. Then, during discovery, their experts testified they could hear those lyrics without any special electronic enhancement of the tape. In other words, the lyrics were not hidden, or mysterious; rather, the lyrics were audible, and thus not subliminal.

Discovery also established that this "28 second interval" included the words "bodge" and "get the flaps out" and *not* the words "get the gun and try it" or "why try, why try". The words that plaintiffs and their experts claimed they heard (and which therefore could not be subliminal) were clever interpretations by plaintiffs of words that were not particularly clear. The district court appropriately declined to impose a penalty on anyone for singing and recording unclear lyrics.

Last, Petitioners have misstated the substance of the affidavits of Max Norman (the recording engineer for the "Suicide Solution" song) and Ozzy Osbourne (the vocalist) as well as Mr. Osbourne's testimony by deposition. Those affidavits unequivocally established that Mr. Osbourne did not sing a subliminal message in "Suicide Solution". Petitioners' conclusion that the affidavits do not speak to the issues in the litigation is an inaccurate characterization of the record. Mr. Norman and Mr. Osbourne described under oath the actual lyrics sung during the 28 second interval. Those lyrics did not direct suicide. In addition, the affidavits of Mr. Norman and Mr. Osbourne plainly stated that there was absolutely no manipulation of the tape in any way to change the lyrics on the "Suicide Solution" song. Moreover, by deposition Mr. Osbourne testified that the music contained no subliminals. Those affidavits and the deposition testimony were unrefuted by Petitioners.

The Petition only asks this Court to consider what courts have already uniformly rejected based on the First Amendment: Music is a protected form of speech. Further, Petitioners' claims do not pass muster under *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827 (1969). This is

so because the lyrics of "Suicide Solution" do not advocate anything imminent and because the medium itself reflects recorded statements made years before the listeners hear the lyrics. *Brandenburg* applies to listeners of all ages.

The Petition appears to argue the social worth of Osbourne's music. The Supreme Court should not legislate the musical tastes of the country particularly where the tastes are being twisted by the misinterpretation and misunderstanding of the music at issue. Instead, society should reject music it finds socially unacceptable by not supporting such musicians or by promoting better forms of music among families.

Hamilton: *Hamilton* arose out of the March 1988 suicide of 17-year-old Harold Michael Hamilton who owned the cassette tape of the Osbourne album "Tribute." A live version of the song "Suicide solution" appears on the "Tribute" album but does not contain the 28 second interval. Although the initial complaint alleged, without basis, that the "Tribute" album contained a subliminal, Petitioner's counsel later admitted that no "subliminal" message existed on "Tribute." Petitioner now relies solely on the admitted audible and intelligible lyrics of "Suicide Solution" as the basis for her tort claim.

REASONS WHY THE PETITION SHOULD BE DENIED

1. NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTIONS PRESENTED IN THE PETITION.

a. The first and second "Questions Presented" in the Petition address whether "the First Amendment to the Constitution would protect speech which incites or encourages minors to commit suicide." Neither the Eleventh Circuit, nor the United States District Court for the Middle District of Georgia were required to decide that question in this proceeding.

The District Court in *Waller,* and in *Hamilton* by its explicit adoption of the *Waller* decision, held that the Petitioners "failed to demonstrate any manner in which Defendant's music [could be] categorized as speech which incites imminent lawless activity." (Pet. 16A). On appeal, the Eleventh Circuit Court, without further opinion, affirmed the decision of the district court granting Osbourne's and CBS' Motion for Summary Judgment. The district court applied the standard adopted in *Brandenburg v. Ohio,* 395 U.S. 444, 89 S. Ct. 1827 (1969) to determine whether Osbourne's lyrics incited suicide. Incitement was not found and the district court properly granted summary judgment. The question put to this Court was settled by *Brandenburg* and its progeny and as such further review by this Court is inappropriate.

b. The facts of record do not permit the formulation or resolution of the second "Question Presented". Not only are the lyrics Petitioners claim "incite" suicide nonexistent, but the Petitioners' second "Question Presented" seeks a determination by this Court that Osbourne's

music proximately caused the suicide of both Waller and Hamilton. Nothing in the record would support such a determination. Once the district court determined that the speech in question was protected it was unnecessary to reach the issue of causation.

c. The essence of the third "Question Presented" is whether Respondents met their burden of proof on summary judgment by "informing the . . . court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, the admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986). As the record reflects, Osbourne and CBS clearly satisfied this burden.

As discussed above, Respondents produced the affidavits of Osbourne and Norman which provided the actual words sung by Osbourne during the 28 second interval, that the 24-track master tape was not manipulated, and that the album did not contain a subliminal message. This evidence was specifically noted by the district court at the summary judgment hearing. Moreover, the record contains Osbourne's written deposition testimony that "Suicide Solution" does not contain subliminal messages. Respondents also directed the district court to the testimony of Petitioners' own witnesses that the alleged "subliminal" could be *heard* on the commercial cassette of "Suicide Solution". Finally, and most tellingly, Respondent's pointed out the testimony of Mr. Hall, Petitioners' "expert," that the music did not contain a subliminal message. By providing the affidavits of Osbourne and Norman and identifying those portions of

the "pleadings, depositions, answers to interrogatories, and admissions on file," which demonstrated the absence of a genuine issue as to the existence of a subliminal message on the Osbourne album "Blizzard of Ozz," Respondents met their initial summary judgment burden.

Given the Respondents' obvious compliance with their initial summary judgment burden, a determination of the third "Question Presented" by this Court is unnecessary.

2. THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA AND THE ELEVENTH CIRCUIT COURT OF APPEALS FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUES.

Petitioners argue that the court of appeals and the district court erred "in failing to recognize . . . an exception . . . under the First Amendment to speech directed to minors which encourages or incites to suicide." However, speech directed or intended to produce imminent lawless action and likely to produce such imminent lawless action is not protected by the First Amendment, as *Brandenburg* and *Hess v. Indiana*, 414 U.S. 105, 74 S. Ct. 326 (1973) hold, regardless of whether it is directed to minors or adults. As such, it was unnecessary and would have been inappropriate for either the district court or the court of appeals to recognize a separate redundant exception for speech directed at any specific group. Given the record created in this action and the decisions of this Court, the district court and the court of appeals were correct in holding that the speech at issue does not fall

within the *Brandenburg* exception and as such is protected by the First Amendment.

Initially, it should be noted that Osbourne's music – including what Plaintiffs identified as unintelligible but audible lyrics – is protected speech under the First Amendment. Entertainment and music are constitutional protected forms of expression. Entertainment as well as political and ideological speech is protected; motion pictures, programs broadcast by radio and television and live entertainment, such as musical and dramatic works fall within the First Amendment's protection. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65, 101 S. Ct. 2176, 2181 (1981) (non-obscene nude dancing). Music, even when it does not contain express and/or audible lyrics, is protected by the First Amendment. *See, e.g., Tacynec v. City of Philadelphia*, 687 F.2d 793 (3rd Cir. 1982), *cert. denied*, 459 U.S. 1172, 103 S. Ct. 819 (1983) (instrumental and choreographed string band performance is a form of expression protected by the First Amendment); *Reed v. City of Shorewood*, 704 F.2d 943, 950 (7th Cir. 1983) ("if the Defendants passed an ordinance forbidding the playing of rock and roll music in the village Shorewood, they would be infringing a First Amendment right . . . "); *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 567 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054, 105 S. Ct. 2115 (1985) ("Music is a form of expression that is protected by the First Amendment").

In *Texas v. Johnson*, 491 U.S. 397, 109 S. Ct. 2533 (1989) this Court reiterated the expansive reach of First Amendment Protection, particularly for non-traditional forms of expression: "[W]e have long recognized that its [First Amendment] protection does not end at the spoken or

written word." *Johnson*, 491 U.S. at 404. In *Johnson*, the Supreme Court recognized the broad reach of the First Amendment and held that even the act of burning the American flag was protected expression.

Moreover, even speech which may be emotionally disturbing and even hurtful to some is protected. As explained by the Court in *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 745, 98 S. Ct. 3026 (1978), "[t]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for affording it constitutional protection." *See, Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916, 99 S. Ct. 291 (1978) (Nazis have the right to march in a predominately Jewish neighborhood despite that this form of expression would "seriously disturb, emotionally and mentally, at least some and probably many of the village residents."); *Terminiello v. Chicago*, 337 U.S. 1, 5, 69 S. Ct. 896 (1949) (speech that "invites dispute . . . induces a condition of unrest, creates dissatisfaction with conditions as they are or even stirs people to anger [was] among the high purposes of the First Amendment.") *Erznoznik v. Jacksonville*, 422 U.S. 205, 210, 95 S. Ct. 2268 (1975) ("Much that we encounter offends our aesthetic, if not our political and moral sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.")

Osbourne's music, albeit "heavy metal" rock music, which Petitioners contend is morally wrong, unquestionably constitutes speech and/or "expression" which is protected under the ambit of the First Amendment. As

noted above the only exception urged upon this court by Petitioners is that of speech which incites imminent lawless activity.

Petitioners contend that the lyrics of the Osbourne song "Suicide Solution" incited Waller and Hamilton to commit suicide. However, nowhere is it explained how Osbourne's lyrics fit within the *Brandenburg* exception. In *Brandenburg* this Court held:

> [t]he constitutional guarantees of free speech or free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Brandenburg v. Ohio, 395 U.S. 444, 447, 89 S. Ct. 1827, 1829 (1969). In *Hess v. Indiana*, 414 U.S. 105, 94 S. Ct. 326 (1973) this Court found that the statement "We'll take the fucking street later (or again)", when made in connection with an anti-war demonstration, was protected speech not falling within the *Brandenburg* exception. The statement "amounted to nothing more than advocacy of illegal action at some indefinite future time." Continuing, this Court added:

> Since there was no evidence, or rational inference from the import of the language that [the] words were intended to produce, and likely to produce, *imminent* disorder, those words could not be punished by the State on the ground that they had "a tendency to lead to violence".

Hess, 414 U.S. at 108-09. It is irrational to contend that prerecorded lyrics command or are likely to produce a

suicidal act. Even if it were presumed that the pre-recorded lyrics were intended to "incite", the static nature of a recording removed in time from the act, would not provide the "immediacy" necessary under *Brandenburg* and *Hess* to strip the speech of its First Amendment protection. As stated in *McCollum v. CBS Inc.*, 249 Cal. Rptr. 187, 193 (Cal. App. 2d Dist. 1988) "[n]one of the lyrics relied upon by plaintiffs, even accepting their literal interpretation of the words, purport to order or command anyone to any concrete action at any specific time, much less immediately."

Without making any attempt to contend with, or even recognize the deficiencies of their case in light of *Brandenburg*, Petitioners launch into a discussion of numerous cases which they insist support a limitation of Osbourne's First Amendment rights when children are involved. Petitioners seem to advocate a new exception using an alternative definition of "incitement" to strip First Amendment protection from speech to which children may be exposed.

The cases cited to support a new exception are inapposite. Initially, Petitioners rely on a recent Eleventh Circuit decision, *American Book Sellers, et al. v. Webb*, 919 F.2d 1493 (11th Cir. 1990) *reh'g den'd*, 930 F.2d 925 (11th Cir. 1991). In *Webb*, the Eleventh Circuit considered a Georgia statute (O.C.G.A. §16-12-103) which makes it a criminal offense to display in a place accessible to minors any material deemed "harmful to minors". The Court initially noted that "content based restrictions on speech survived constitutional scrutiny only under extraordinary circumstances." 919 F.2d at 1500. Moreover, the *Webb* court noted that, "the State's interest in protecting its youth justifies a

limited burden on free expression" and that absent impermissible burden on adults, "States may deny minors access to materials obscene to them." *Id.* The Court ruled, however, that "it is clear that a State may not prohibit an adult's access to material that is obscene for minors but not adults." *Id.* Statutes which create an "indirect burden on adults' First Amendment right to have access to materials not obscene for adults must be narrowly drawn." *Id.* The "regulation must leave open adequate alternative channels, must not restrict expression at the source, and must not impose 'significant' restrictions on adult access." *Id.* (Citations omitted). The key issues to be decided were whether the restriction on the adult access was unnecessarily burdensome or significant and whether alternative means of adult access were unduly restricted. Because the Eleventh Circuit found that blinders could be used to comply with this statute, allowing adults to readily locate and purchase the materials that were not obscene as to them, it held that the statute was narrowly drawn and constitutional. In contrast, the exception and corresponding civil liability sought by Petitioners would cut expression off at its source, totally prohibiting adult access to the music of Mr. Osbourne and numerous other artists.

Moreover, under the standards established in *Webb*, this music is not "harmful to minors" and thus no restriction on a minor's First Amendment rights is justified. *Webb* holds that "if any reasonable minor, including a seventeen year old would find serious value [in the material], the material is 'not harmful to minors'." 919 F.2d at 1504-1505. Thus, "if a work is found to have serious

literary, artistic, political or scientific value for a legitimate minority of normal, older adolescents, then it cannot be said to lack such value for the entire class of juveniles taken as a whole." *Id.* (Citation omitted). Obviously, it is quite likely that a minority, if not a majority, of minors could find some serious artistic value in this and similar music.

Petitioners also rely on *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 109 S. Ct. 2829 (1989) and *Butler v. Michigan*, 352 U.S. 380, 77 S. Ct. 524 (1958). In *Sable Communications*, this Court was asked to rule on the constitutionality of § 223(b) of the Communications Act of 1934 which banned indecent or obscene interstate commercial telephone messages. The necessity of protecting children from exposure to indecent dial-a-porn messages was advanced as the government's interest supporting a total ban on such speech. *Sable*, 109 S. Ct. at 2836. The government argued that a total ban on such speech was justified because nothing less could prevent children from gaining access to such messages. *Sable*, 109 S. Ct. at 2837. In holding the ban unconstitutional this Court stated: "in its present form [the total ban] has the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear. It is another case of 'burn(ing) up the house to roast the pig.' " *Sable*, 109 S. Ct. at 2839, *quoting Butler v. Michigan*, 352 U.S. at 383. As in the case of the Eleventh Circuit's decision in *Webb*, this Court's decision in *Sable* prohibits broad based content restrictions on speech for the protection of minors, at the expense of the general population's First Amendment rights.

Curiously, Petitioners also cite *Butler v. Michigan*, 352 U.S. 380 (1957) in their attempt to suppress Osbourne's expression. In *Butler*, this court was asked to pass judgment on a criminal statute prohibiting the distribution of reading materials, pictures or "*recordings*, containing obscene, immoral, lewd or lascivious language, . . . *tending to incite minors* to violent or deprived or immoral acts . . . ". (Emphasis added) The statute sought to restrict freedom of expression under the same terms that Petitioners now urge on this Court. *Butler v. Michigan*, 532 U.S. at 381. In reversing a conviction under the statute, Justice Frankfurter stated "[t]he incident of this [restriction] is to reduce the adult population . . . to reading only what is fit for children." *Id.* at 383-384. Further, such restriction "arbitrarily curtails one of those liberties of the individual, . . . that history has attested as the indispensable conditions for the maintenance and progress of a free society." *Id.* at 384.

Finally, an attempt is made to analogize the recent decision in *Osbourne v. Ohio*, 495 U.S. 103, 110 S. Ct. 1691 (1990) to the position the Petitioners now advocate. Such analogy cannot withstand careful scrutiny. The decision in *Osbourne* upheld an Ohio criminal statute prohibiting the possession of nude photographs of minors. The holding was supported by the State's proffered interest of protecting the psychological and physiological condition of minors. *Id.* at 1696. However, justifying the restriction was not the need to keep such materials out of minors' hands, but the prevention of the exploitation of the adolescents actually pictured. *Id.* at 1696-97. Obviously, a different and stronger case exists for restrictions on

expression which seek to derive profit from the exploitation and sexual abuse of children than for restrictions on lyrics directed at the general population. The expression in the instant case is not dependent on the exploitation and abuse of children, and as such the rationale for the total ban on speech in *Osbourne* is inapplicable.

The cases cited to support the argument that the First Amendment does not preclude tort liability are likewise easily distinguishable from the cases at bar. They in fact support the correctness of the decision below. As such they are worthy of only a limited response.

In *Olivia N. v. National Broadcasting Company, Inc.*, 141 Cal. Rptr. 511 (Cal. App. 2d Dist. 1977), it was alleged that a young girl was attacked and "artificially raped" with a bottle by minors who had viewed a similar scene in a television program broadcast by NBC. It was alleged that the young girl's injuries were proximately caused by the telecast. As in the cases at bar it was contended (1) that tort liability could constitutionally be imposed despite the absence of "incitement" as defined by *Brandenburg* or (2) that an alternative definition of "incitement" should be applied. After viewing the film in question the trial judge in *Olivia N.* determined that the acts depicted did not constitute incitement and dismissed the case.

The appeals court reversed and remanded because, while the trial judge's act, of finding as a matter of law that incitement did not exist, would have been appropriate had a summary judgment motion been pending, it was inappropriate in *Olivia N.* since no summary judgment motion was pending. For this reason alone the

plaintiff was given an opportunity to demonstrate "*Brandenburg* incitement" at trial. Thus, *Olivia N.* offers no support for the assertion that "incitement" is under all circumstances a jury question. In both *Waller* and *Hamilton* a proper summary judgment motion was pending and the District Court was well within its right to make a finding on "incitement" as a matter of law.

Petitioners also cite *Weirum v. RKO General, Inc.* 15 Cal. 3d 40, 123 Cal. Rptr. 468, 539 P.2d 36 (1975). Importantly, *Weirum* was discussed and distinguished by the California Court of Appeal not only in *Olivia N. v. National Broadcasting Company, Inc.*, 178 Cal. Rptr. 888 (1981), *cert. denied.*, 458 U.S. 1108 (1982), but also in *McCollum v. CBS*, 249 Cal. Rptr. 187 (Cal. App. 1988), *review denied*, 202 Cal. App. 3d 989 (Cal. 1988). In *McCollum* the California Court of Appeal correctly distinguished between the live, on-the-air encouragement of contestants to race in *Weirum* and the fixed recorded lyrics of a song on a record album as a basis for tort liability.

Finally, Petitioners attempt to distinguish *Waller* and *Hamilton* from the well-reasoned decision of the California Court of Appeal in *McCollum v. CBS Inc.* Initially Petitioners made virtually the same allegations considered by the *McCollum* Court, and therefore no meaningful distinction between the two cases can be made. In *McCollum*, it was alleged that a young man committed suicide and that Osbourne's music was the direct and proximate cause of that suicide. *McCollum*, 249 Cal. Rptr. at 187. The Court considered the First Amendment protection of the song "Suicide Solution," including the "not immediately intelligible" words in the 28 second interval

contained in that song, as the alleged proximate cause of the decedent's suicide. Thus, precisely the same alleged words at issue in *Hamilton* and *Waller* and which Petitioners label "subliminal," were specifically addressed and determined to be protected by the First Amendment.

The *McCollum* court correctly held that under *Brandenburg, supra,* Osbourne's lyrics and music (even the 28 second interval) were protected speech because the lyrics did not "command anyone to any concrete action at any specific time, much less immediately." *McCollum,* 249 Cal. Rptr. at 193. As explained in *McCollum*

> Merely because art may evoke a mood of depression as it figuratively depicts the darker side of human nature does not mean that it constitutes a direct "incitement to imminent violence." The lyrics sung by Osbourne may well express a philosophical view that suicide is an acceptable alternative to a life that has become unendurable – an idea which, however unorthodox, has a long intellectual tradition. [Footnote omitted]. If that is the view expressed as Plaintiffs apparently contend, the Defendants are constitutionally free to advocate it.

McCollum, 249 Cal. Rptr. at 194.

Plainly there is no distinction between *McCollum* and the cases at bar. The "masked" lyrics, even as understood by the *Waller* Petitioners and their experts, simply do not constitute "incitement" as explained in *McCollum,* irrespective of the label placed on the lyrics or the irrational response of the decedents.

Thus, after a review of the existing case law, it is absolutely clear that the music of Mr. Osbourne is protected by the First Amendment and cannot be punished

through a civil suit for damages. As the record reflects, Petitioners failed to make their case below. Therefore, the courts below correctly decided the issues and held in favor of freedom of expression and against censorship.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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